



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 16, 2010

Mr. Robert Schell
Assistant Director and General Counsel
North Texas Tollway Authority
5900 West Plano Parkway Suite 100
Plano, Texas 75093

OR2010-12390

Dear Mr. Schell:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 390342.

The North Texas Tollway Authority (the "authority") received a request for information relating to "the three short[-]listed Design-Build teams for the [State Highway] 161 project." You state that some of the requested information either has been or will be released. You take no position on the public availability of the rest of the requested information.¹ You believe, however, that the remaining information may implicate the interests of third parties.² You state, and have provided documentation demonstrating, that the third parties concerned

¹Although you initially raised section 552.104 of the Government Code, you have submitted no arguments in support of that exception. Accordingly, this decision does not address section 552.104. *See* Gov't Code §§ 552.301(e)(1)(A), .302.

²You inform us that the third parties concerned are Jacobs Engineering Group, Inc. ("Jacobs"); Prairie Link Constructors ("Prairie Link"); and Williams Brothers Construction Company ("Williams Brothers").

were notified of this request for information and of their right to submit arguments to this office as to why the information should not be released.³ We received correspondence from an attorney for Williams Brothers.⁴ We have considered Williams Brothers' arguments and reviewed the information you submitted.⁵

We note that the authority did not submit some of the information at issue to this office within the fifteen-business-day period prescribed by section 552.301(e) of the Government Code. *See* Gov't Code § 552.301(e)(1)(D). Thus, the information that was not timely submitted is presumed to be subject to required public disclosure under section 552.302 of the Government Code. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Therefore, we will determine whether the submitted information, including the information that was not timely submitted, must be withheld on either of those grounds.

We note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Jacobs or Prairie Link. Thus, because neither of those parties has demonstrated that any of the information at issue is proprietary for the purposes of the Act, none of the information may be withheld on the basis of any proprietary interest that Jacobs or Prairie Link may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address the arguments we received from Williams Brothers. The company states, among other things, that some of its information was marked confidential when it was submitted to the authority. We note that information is not confidential under the Act simply because the party that submitted the information anticipated or requested that it be kept

³*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

⁴We note that Williams Brothers' arguments encompass information relating to the company that the authority did not submit to this office. This decision is applicable only to the information that the authority submitted in requesting this decision. *See* Gov't Code § 552.301(e)(1)(D).

⁵You inform us that the submitted financial statements of Archer Western Contractors, Ltd. and Zachary Construction Corporation were submitted to this office in error and are not responsive to the instant request for information. You state that the authority does not seek a ruling on those records. Accordingly, this decision does not address the public availability of the non-responsive records or the comments we received from Zachary Construction Corporation.

confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Therefore, the authority must release Williams Brothers’ information unless it falls within an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

Williams Brothers claims exceptions to disclosure under sections 552.101 and 552.110 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other constitutional, statutory, or case law makes confidential. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Williams Brothers has not directed our attention to any law under which any of the information at issue is considered to be confidential for the purposes of section 552.101. We therefore conclude that the authority may not withhold any of the submitted information under section 552.101 of the Government Code.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Gov’t Code § 552.110(a)-(b).

The Supreme Court of Texas has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or

catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.⁶ *See* ORD 552 at 5. We cannot conclude that section 552.110(a) is applicable, however, unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Williams Brothers contends that portions of its information are trade secrets under section 552.110(a). The company also contends that some of its information is excepted from disclosure under section 552.110(b). Having considered the company's arguments and reviewed the information at issue, we conclude that the authority must withhold Williams Brothers' financial statements under section 552.110(b). We have marked that information. We find that Williams Brothers has not demonstrated that any of the remaining information at issue constitutes a trade secret under section 552.110(a). We also find that Williams Brothers has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause the company substantial competitive harm. We therefore conclude that the authority may not withhold any of the remaining information relating to Williams Brothers under section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b); *see also* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances

⁶The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

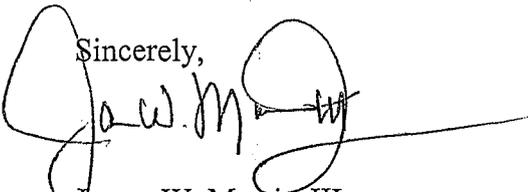
We note that section 552.136 of the Government Code is applicable to some of the remaining information.⁷ Section 552.136(b) provides that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). The authority must withhold the account number we have marked in Williams Brothers' information under section 552.136.

In summary, the authority must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The rest of the responsive information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

⁷This office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

Ref: ID# 390342

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Mr. Jason Ray
Riggs Aleshire & Ray
700 Lavaca Street Suite 920
Austin, Texas 78701
(w/o enclosures)

Mr. T. Coyt Webb
Zachry Construction Corporation
P.O. Box 33240
San Antonio, Texas 78265-3240
(w/o enclosures)

Mr. Kim Sheldon
Archer Western Contractors, Ltd.
2121 Avenue J Suite 103
Arlington, Texas 76006
(w/o enclosures)

Mr. David Justice
Jacobs Engineering Group, Inc.
7950 Elmbrook Drive
Dallas, Texas 75247-4975
(w/o enclosures)

Mr. Bob Stevens
Prairie Link Constructors
108 McNutt Building 2
Hutto, Texas 78634
(w/o enclosures)